LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 19 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 71

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT, AND ROSE MARIE COLLINS, PETITIONERS,

versus

CITY OF GREENVILLE, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF RESPONDENT

THOMAS A. WOFFORD,
THEODORE A. SNYDER, JR.,
200 Masonic Temple,
Greenville, South Carolina,
W. H. ARNOLD,
City Attorney,
Lawyers' Building,
Greenville, South Carolina,
H. F. PARTEE,
Assistant City Attorney,
Lawyers' Building,
Greenville, South Carolina,
Attorneys for Respondent.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

PAGE

Questions Presented 1

Statement of the Case 2

Argument:

I. The proprietor of a privately owned restaurant has the right to serve only those whom he chooses and to refuse to serve those whom he desires not to serve for whatever reason he may determine 3

II. There was no state action and consequently no denial of the equal protection of the laws secured by the Fourteenth Amendment in the refusal of lunch counter service to the Negro petitioners by a private entrepreneur and their subsequent prosecution for trespass upon failure to depart from the premises after being requested to leave and given ample time to do so 7

III. Petitioners were not denied the freedom of speech secured to them by the Fourteenth Amendment when they were convicted for trespass for refusing to depart after being directed to leave the lunch room of a Kress' store where they desired to conduct a demonstration 16

IV. Conviction for violation of a statute making it an offense to remain on premises after being requested to leave, although the statute did not require the person making the request to leave to establish his authority to issue such request, did not deprive petitioners of freedom of speech 21

Conclusion 24

TABLE OF CASES

PAGE

Alpaugh v. Wolverton, 184 Va. 943, 36 S. E. (2d) 906 (1946) 3

Brookside-Pratt Mining Co. v. Booth, 211 Ala. 268, 100 So. 240 (1924) 6, 9

Boynton v. Virginia, 364 U. S. 454 4

Burstyn v. Wilson, 343 U. S. 495 21

Buenzle v. Newport Amusement Association, 29 R. I. 23, 68 Atl. 721, (1908) 6

Carnegie-Illinois Steel Corp. v. United Steelworkers of America, 353 Pa. 420, 45 A. (2d) 857 (1946) 20

Civil Rights Cases, 109 U. S. 3 7

Commonwealth v. Richardson, 313 Mass. 632, 48 N. E. (2d) 678 (1943) 18

Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20 (1905) 5, 15

Continental Baking Company v. Woodring, 286 U. S. 352 15

Fiske v. Kansas, 274 U. S. 380 16

Fred Harvey v. Corporation Commission of Oklahoma, 102 Okla. 226, 229 P. 428 (1924) 6

Frohwerk v. United States, 249 U. S. 204 17

Garifine v. Monmouth Park Jockey Club, 29 N. J. 47, 148 A. (2d) 1, (1959) 5, 16

Gitlow v. New York, 268 U. S. 652 16

Greenfeld v. Maryland Jockey Club, 190 Md. 96, 57 A. (2d) 335 (1948) 5, 16

Hague v. C. I. O., 307 U. S. 496 18

Hall v. Commonwealth, 118 Va. 72, 49 S. E. (2d) 369 (1948) app. dism. 335 U. S. 875, reh den 335 U. S. 912 18

Horn v. Illinois Central Railway Co., 327 Ill. App. 498, 64 N. E. (2d) 574 (1946) 4

Kovacs v. Cooper, 336 U. S. 77 ..... 19, 20

Madden v. Queens County Jockey Club, 296 N. Y. 249, 72 N. E. (2d) 697 (1947) cert. den. 332 U. S. 761 ..5, 15

Marrone v. Washington Jockey Club, 227 U. S. 633 (1931) 6, 10

TABLE OF CASES—Continued

PAGE

Marsh v. Alabama, 326 U. S. 501 18
Martin v. City of Struthers, 319 U. S. 41 10
Meisner v. Detroit B. I. & W. Ferry Co., 154 Mich. 545, 118 N. W. 14 (1908) 5
N. L. R. B. v. Fansteel Metallurgical Corporation, 306 U. S. 240 20
Nance v. Mayflower Tavern, 106 Utah 517, 150 P. (2d) 773 (1944) 4
Noble v. Higgins, 95 Misc. 328, 158 N. Y. S. 867 (1916) .. 4
The Oakmar, 20 F. Supp. 650 (Md. 1937) 20
Korthinos v. Niarchos, 175 F. (2d) 730 (4th Cir. 1949) cert. den. 338 U. S. 894 20
People ex rel Burnham v. Flynn, 189 N. Y. 180, 82 N. E. 169 (1907) 5
Public Utilities Commission v. Pollack, 191 F. (2d) 450 (1951) 343 U. S. 451 19
Rutledge Co-op Ass'n v. Baughman, 153 Md. 297, 138 Atl. 29 (1927) 15
Saia v. New York, 334 U. S. 558 18
Schenck v. United States, 249 U. S. 47 17
Schneider v. State, 308 U. S. 147 17
Shelley v. Kraemer, 334 U. S. 1 .....7, 11, 12
Slack v. Atlantic White Tower System, Inc., 181 F. Supp. 124 (Md. 1960) aff'd. 284 F. (2d) 746 (4th Cir. 1960) 4
Smith v. California, 361 U. S. 147 21
State v. Lightsey, 43 S. C. 114, 20 S. E. 975 (1895) 10
State of Starnes, 213 S. C. 304, 49 S. E. (2d) 209 (1948) 9
Thornhill v. Alabama, 310 U. S. 88 .....18, 19
Truax v. Corrigan, 257 U. S. 312 20
Tucker v. Texas, 326 U. S. 517 18
United States v. Colgate & Co., 250 U. S. 300 5
United States v. Greenbaum, 138 F. (2d) 437 (3rd Cir. 1943) 22

TABLE OF CASES—Continued

PAGE

Watchtower Bible & Tract Society v. Metropolitan Life Insurance Company, 279 N. Y. 339, 79 N. E. (2d) 433 (1948) 18

Watkins v. Oaklawn Jockey Club, 86 F. Supp. 1006 (W. D. Ark. 1949) aff'd 183 F. (2d) 440 (8th Cir. 1950) ..5, 14

Williams v. Hot Shoppes, 293 F. (2d) 835, 840 (D. C. Cir. 1961) cert. den. 370 U. S. 925 14

Williams v. Howard Johnson's Restaurant, 268 F. (2d) 845 (4th Cir. 1959) 14, 16

Winters v. New York, 333 U. S. 507 21

Woollcott v. Shubert, 217 N. Y. 212, 111 N. E. 829 (1916) 5, 15

Yick Wo v. Hopkins, 118 U. S. 356 17

CONSTITUTION OF THE UNITED STATES

Amendment I 16

STATE STATUTES

Section 16-388, Code of Laws of South Carolina, 1952, as amended 2

OTHER AUTHORITIES

Annotation, 9 A. L. R. 379 6

Beale, The Law of Innkeepers and Hotels (1906) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 71

JAMES RICHARD PETERSON, YVONNE JOAN EDDY, HELEN ANGELA EVANS, DAVID RALPH STRAWDER, HAROLD JAMES FOWLER, FRANK G. SMITH, ROBERT CROCKETT, JAMES CARTER, DORIS DELORES WRIGHT, AND ROSE MARIE COLLINS, PETITIONERS,

versus

CITY OF GREENVILLE, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF RESPONDENT

QUESTIONS PRESENTED

Petitioners were convicted of trespassing upon their refusal to leave a lunch counter after the elapse of a reasonable time for their departure. Their original presence was for the purpose of a demonstration to protest the refusal of service to them. The premises and business where the events occurred are privately owned.

I

Does the operator of a privately owned restaurant or lunch counter open to the public have a right to refuse service to prospective customers?

II

Was there any "state action" in the refusal of lunch counter service to Negro petitioners by a private entrepreneur, and their prosecution for trespass upon failure to leave the premises after notice to depart?

III

Were petitioners denied the freedom of speech secured to them by the Fourteenth Amendment when they were convicted for trespass for refusing to obey the order of the manager to leave the lunch room of a Kress' Store where they desired to conduct a demonstration?

IV

Does a statute making it an offense to remain on premises after notice to leave is given deprive petitioners of Freedom of Speech where the statute does not require the person giving the notice to establish his authority over the premises?

STATEMENT OF THE CASE

S. H. Kress and Company operates a chain of variety stores, with a branch in Greenville, South Carolina, described as a junior department store. (R. 20.) One of its departments is a lunch counter, with seats for fifty-nine persons. (R. 25.) On the morning of August 9, 1960, the petitioners, all Negroes, took seats there and requested service. (R. 36.) They were told that Negroes were not served there. (R. 36.) Following that the manager had the lights turned off, announced that the lunch counter was closed, and requested everyone to leave. Everyone left except the petitioners. (R. 19, 44.) They did not leave. After approximately five minutes, they were arrested for trespass in violation of Section 16-388, Code of Laws of South Carolin, 1952, as amended. (R. 19.)

The petitioners were refused service because they were Negroes. The Kress headquarters has a policy of following local customs in reference to serving members of the public and the local manager acted pursuant to orders to that effect (R. 21), the local custom being to serve whites only.

The petitioners were subsequently convicted of trespass and sentenced. (R. 47.) On appeal the convictions were affirmed, first by the County Court of Greenville County (R. 52) and then by the Supreme Court of South Carolina. (R. 59.) The case is now before this Court on Certiorari. (R. 65.)

ARGUMENT

I

The proprietor of a privately owned restaurant has the right to serve only those whom he chooses and to refuse to serve those whom he desires not to serve for whatever reason he may determine.

At common law, proprietors of private establishments had the absolute right to serve whom they pleased. They were under no obligation to the general public, and had no duty to serve all who sought their services. At common law restaurants were such private establishments, and today, in the absence of statute, their owners may select their clientele upon any basis they desire. *Alpaugh v. Wolverton*, 184 Va. 943, 36 S. E. (2d) 906 (1946). There is no statute in South Carolina which changes the rights of a restaurant operator or imposes any duty on him to serve all who present themselves for service. The manager of Kress' store was fully within his rights when he refused to serve the petitioners at the lunch counter in that store.

This was not the rule as to all callings at common law. The innkeeper was treated differently. Innkeeping was regarded as a public calling, and innkeepers were under a duty to serve all who sought their services. The reason for

this distinction is explained by Beale, "The Law of Innkeepers and Hotels," 1906. According to Beale, the inn developed to serve the needs of the traveler in medieval England. Night-time travel was dangerous, and the condition of the roads made frequent stops necessary. Without closely spaced inns, travel would have been impossible. The needs of the wayfarer were entirely different from those of the local population, and the duties owed to each differed accordingly. The difference between the duties of the establishments set up to accommodate these diverse needs is illustrated by Beale as follows:

> "The one was instituted for the weary traveler, the other for the native; the one furnished food that the traveler might continue his journey, the other furnished drink for the mere pleasure of neighbors; the one was open to the traveler for protection at night; the other turned its guest out the very moment when he most needed protection and left him to find it, if his remaining senses permitted him to do so, in his own home. It is unnecessary, therefore, to point out the fact that a tavern is not an inn, and the innkeeper's duties do not extend to the tavernkeeper." As quoted in *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P. (2d) 773 (1944).

The obligations placed on inns and innkeepers at common law was not applied to restaurants. *Horn v. Illinois Central Railway Co.*, 327 Ill. App. 498, 64 N. E. (2d) 574 (1946) *; *Noble v. Higgins*, 95 Misc. 328, 158 N. Y. S. 867 (1916); *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124 (Md. 1960), affd. 284 F. (2d) 746 (4th Cir. 1960).

---

* This Court later held that a restaurant which is operated as an integral part of a bus company's interstate transportation service must be operated without discrimination, but in so holding refused to hold that rule applicable to restaurants such as the one here concerned:

> "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act." *Boynton v. Virginia*, 364 U. S. 454.

A restaurant is treated the same in law as the store, where there is no obligation on the storekeeper to sell, and no obligation on the part of the general public to buy. *United States v. Colgate & Co.*, 250 U. S. 300.

With the exception of innkeepers and common carriers, public utilities, and the like, who operate by virtue of a franchise from the state, operators of businesses catering to the public have the right to select their clientele, and to make such selection based on any reason, or no reason at all.

Nor are restaurants the only enterprises to which this rule of law has been applied. A theater may refuse admission to anyone who desires entrance. *Collister v. Hayman*, 183 N. Y. 250, 76 N. E. 20 (1905); *People ex rel. Burnham v. Flynn*, 189 N. Y. 180, 82 N. E. 169 (1907). In *Woollcott v. Shubert*, 217 N. Y. 212, 111 N. E. 829 (1916) a theater owner was upheld in excluding a drama critic whose reviews were not favorable. The Court said:

> "His [the proprietor's] right to and control of it is the same as that of any private citizen in his property and affairs. He has the right to decide who shall be admitted or excluded."

The operators of race tracks have the same common law right to choose their customers. *Greenfeld v. Maryland Jockey Club*, 190 Md. 96, 57 A. (2d) 335 (1948); *Watkins v. Oaklawn Jockey Club*, 86 F. Supp. 1006 (W. D. Ark. 1949), aff'd., 183 F. (2d) 440 (8th Cir. 1950); *Garifine v. Monmouth Park Jockey Club*, 29 N. J. 47, 148 A. (2d) 1 (1959); *Madden v. Queens County Jockey Club*, 296 N. Y. 249, 72 N. E. (2d) 697 (1947), cert. den., 332 U. S. 761.

A ferry operator who is not engaged in general carriage has the same right. *Meisner v. Detroit B. I. & W. Ferry Co.*, 154 Mich. 545, 118 N. W. 14 (1908). In that case the court recognized that it was just by discrimination that the ferry company secured the type of patron and conse-

quently the financial benefits necessary to make its operations a success. What is true of the ferry business is true of many others. They depend on the patronage of a particular class of patrons. Many businesses succeed because they cater to the particular desires of a small class of persons. The existence of individual preferences and desires is a fact of the economic give and take of business and one on which its success is often based. The economic realities of operating a business open to the public make it necessary for survival that the operator have the right to select his customers. For example, it is reasonable that a restaurant operator be able to require his men patrons to wear coats, no matter how clean or neat their appearance might be otherwise, *Fred Harvey v. Corporation Commission of Oklahoma,* 102 Okla. 226, 229 P. 428 (1924), or for a dance hall proprietor to refuse admission to persons wearing uniforms, as was done in *Buenzle v. Newport Amusement Association,* 29 R. I. 23, 68 Atl. 721 (1908).

Petitioners, and others, had an implied license to go into the Kress store. The general law on this point is summarized in the annotation, 9 A. L. R. 379, as follows:

> "It seems to be well settled that although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual and to eject such individual from the store if he refuses to leave when requested to do so."

In this case when the petitioners were requested to leave the lunch counter, their implied license was revoked. They no longer had any right to remain there, rather, they were under a duty to depart. If they did not leave peaceably after being given a reasonable opportunity to do so, the management had the right to use such force as would be necessary to effect their removal. *Brookside-Pratt Mining Co. v. Booth,* 211 Ala. 268, 100 So. 240 (1924); *Marrone v.*

Washington Jockey Club, 227 U. S. 633 (1913). Five minutes was certainly a reasonable time for them to leave, where they had nothing more to do than stand up and walk away. By refusing to leave when requested, the petitioners became trespassers, and invited the use of force to accomplish their removal. The petitioners were in a place where they had no right to be and where they knew they were not wanted and had no right to remain. They cannot now object to their removal from that place by forceable means.

II

There was no state action and consequently no denial of the equal protection of the laws secured by the Fourteenth Amendment in the refusal of lunch counter service to the Negro petitioners by a private entrepreneur and their subsequent prosecution for trespass upon failure to depart from the premises after being requested to leave and given ample time to do so.

It is state action which results in denial of the equal protection of the laws which is prohibited by the Fourteenth Amendment. Private conduct, no matter how discriminatory, is not unlawful under that Amendment. *Civil Rights cases*, 109 U. S. 3; *Shelley v. Kraemer*, 334 U. S. 1. Nothing transpired in the case at bar which can be called state action by the State of South Carolina.

The management of Kress' store, in refusing service to petitioners and requesting them to leave was acting purely on a business choice made by a corporate management located outside the state. The manager testified positively on this as is shown by the record:

> "Q. What is the policy of Kress', Greenville, South Carolina store with regard to serving Negroes and whites at its lunch counter?
>
> "A. We follow local customs.

"Q. Now, sir, 'we follow local customs,' is that orders from your headquarters?

"A. Yes, sir.

"Q. It is?

"A. Absolutely.

"Q. And you understand as the manager of Kress' assigned to Greenville and possibly in other areas that it is one of the mandates of your national organization business chain to follow local custom with reference to serving members of the public?

"A. That's correct." (R. 21, 22.)

And on cross examination:

"Q. Do I understand then further that you are saying that the presence of Negroes at your lunch counter was contrary to customs?

"A. Yes, sir.

"Q. And that is why you closed your lunch counter?

"A. Yes, sir, that's right." (R. 23.)

From this it is clear that the refusal of service to the petitioners was based on purely personal motives, dictated by the management of the Kress chain, relying on their best business judgment.

Much is said about an ordinance of the City of Greenville requiring segregation in eating places. (R. 49). This ordinance, however, could have had no part in causing refusal of service to the petitioners. The policy formulated at Kress national headquarters was obviously made without reference to this ordinance. We may assume that the manager of the local store would obey the orders issued by his national organization. If the manager was following his orders in refusing service to the petitioners, then he would have refused service to them regardless of the existence of this ordinance.

It is interesting to note that even counsel for the petitioners was not aware of this ordinance until it was men-

tioned during the course of the trial. (R. 11.) Even the police captain who went to the scene did not have this ordinance in mind (R. 11), he being of the opinion it was no longer in effect. (R. 17,) In any event this ordinance did not make the conduct of the petitioners unlawful. Its penalty was imposed on the operator of the eating place.

It is clear also that the action of Kress' manager was not required under this ordinance, assuming arguendo, that it is a valid ordinance. The discussion in the record was of a prohibition against colored and white eating at the same lunch counter. (R. 11.) A reading of the ordinance shows that it prohibits only furnishing meals to the two races at the same counter. The penalty is imposed on the operator of the lunch room. There is nothing in this ordinance which would require a lunch room operator to close his business; there is nothing here which would penalize him for failure to order such persons to leave. When the manager of Kress' store closed his lunch counter and ordered the petitioners to leave, he was not acting because of the positive command of any state or city law, and he was not acting for fear of any sanction he might incur because of failure to obey any such law. His action was dictated solely by his obedience to the orders of his national headquarters, formulated wholly without reference to the ordinance in question.

The arrest of petitioners by police and their conviction in the courts of South Carolina did not constitute state action. It has always been the law in South Carolina that a property owner, whether the property be his home or a place of business, has the right to order any person from the premises, regardless of whether that person originally entered as an invitee. *State v. Starnes*, 213 S. C. 304, 49 S. (2d) 209 (1948). The property owner here was entitled to forceably remove the petitioners if he had desired. *Brookside-Pratt Mining Co. v. Booth*, 211 Ala. 268, 100 So. 240

(1924). Furthermore, anyone ejected by no more force than is reasonable has no complaint, and cannot sue for assault and battery or trespass in the expulsion. *Marrone v. Washington Jockey Club*, 227 U. S. 633.

The use of force by the owner of one in control of property to eject trespassers is not a wise policy. It leads to injuries and sometimes death. It places a premium on force of numbers and physical strength. The rule of "might makes right" runs directly counter to the rule of law. The law of South Carolina at least favors the removal of recalcitrant trespassers by the forces of law rather than brute physical strength. *State v. Lightsey*, 43 S. C. 114, 20 S. E. 975 (1895). It should be unnecessary for a property owner to take the law into his own hands to remove a trespasser, when other, less violent means are available. Punishment by criminal prosecution is the favored way in law of dealing with them. Mr. Justice Black has stated:

> "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off." *Martin v. City of Struthers*, 319 U. S. 41.

The manager of Kress' store was acting within the framework of the law when he requested the police to come to his store. And it is clear that the police were there at his request.

> "Q. Now, on August 9, when these young people were seated at your lunch counter, what did you do first?
>
> "A. The first thing I had one of my employees call the Police Department and turn the lights off and state the lunch counter was closed." (R. 22.)

It was not only proper, but desirable in the interest of law-abiding society, for the petitioners to be arrested by the police and brought to trial in the courts of justice.

This case is not like *Shelley v. Kraemer*, 334 U. S. 1. There is no state action in the resort to the state's courts, such as was found to exist in that case. In *Shelley v. Kraemer* there were fully executed contracts of sale of realty between a willing buyer and a willing seller in each instance. The court system of the states was resorted to there by third parties who sought to interfere and prevent the sales already mutually agreed upon. As stated by the court:

> "The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint."

In the case at bar one link is removed from this chain. The petitioners are analogous to the willing purchasers in Shelley, and S. H. Kress and Company stands in a position analogous to the sellers. Here we have no outside party resorting to the courts to prevent their entering into a contract. Instead, we have the situation of an unwilling seller who refuses to sell and who has a right to refuse to sell, on the one hand, and petitioners, who are willing buyers, and who insist on buying, but have no right to buy, on the other hand. Instead of a consensual agreement, there was an absolute disagreement. It became proper when it appeared the disagreement could not be resolved peaceably for the police and the courts to prevent that disagreement from expanding into violence and to protect the property rights that had already been transgressed.

Shelley v. Kraemer struck down interference backed by state courts in agreements to transfer property. It does not prohibit state police and court action to protect prop-

erty rights where that does not interfere with some agreed upon transfer of property. It cannot be said from the facts of this case that there was any agreement of Kress to sell to petitioners that was prevented from being consummated. The facts show that the only certainty was that Kress would refuse to serve petitioners. That was the company policy as formulated at its headquarters and expressed in an order to the manager of the Greenville store. The petitioners had been refused service on several prior occasions. (R. 38.) Although they may have had conversations with the manager about not being charged, it was manifest that there could be no agreement about this on August 9, 1960, after he requested petitioners to leave. After the refusal of service and warning to leave, it should have been clear to petitioners that there could be no agreement that day. The arrest of petitioners after a reasonable time for their removal did not interfere in or prevent the receipt by petitioners of any luncheon service, nor did it interfere in their making a contract for any such service. The action of the state courts in convicting petitioners therefore did not deny them any rights to which they might otherwise have been entitled.

Discriminatory acts of a private individual taken pursuant to a custom are not state action which is prohibited by the Fourteenth Amendment. As this Court stated in *Shelley v. Kraemer, supra:*

> "That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

Private action cannot be converted into "state action" for purposes of the Fourteenth Amendment unless it is based on some positive legislative pronouncement. One of the great attributes of the rule of law in civilized societies is its certainty. A society subject to the changeable whim of its ruler is not under any rule of law. Freedom is stifled

when action taken under yesterday's known edicts turns out to be unlawful under the next days' announcement. Progress and development cannot be planned unless the laws that will govern that progress and development are known. In this picture custom is on the side of whim and fancy rather than of certainty. If custom can be law, it will often be an unknown law. How will a citizen know when the similar conduct of several has reached such proportions as to be the expected conduct of everyone? How can a citizen know whether he is witnessing the coincidental concurrence of similar reactions to similar circumstances only, and not the concurrence of common reaction to a given situation? We submit that it is an impossible task to learn when a custom begins or when it ceased to be such.

Again customs may vary from place to place. Some customs may cover an area larger than a state, or even a nation. On the other hand a particular custom may not prevail throughout an entire state. How great a proportion of a state's territory would petitioners have a custom cover before they conferred upon it the force of law? Often conflicting customs will be found within a single state. Which of such conflicting customs would then have the force of law? The answer is clear. It is that a custom can never have the force of law.

The difference between law and voluntary custom was pointed out recently by the Fourth Circuit Court of Appeals when it said:

> "This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices. Unless these actions are performed in obedience to some positive provision of state law, they do not furnish a basis for the pending complaint. . . . The

> customs of the people do not constitute state action within the prohibition of the Fourteenth Amendment." *Williams v. Howard Johnson's Restaurant*, 268 F. (2d) 845 (4th Cir. 1959).

This ruling was adopted with approval by the Court of Appeals for the District of Columbia in *Williams v. Hot Shoppes*, 293 F. (2d) 835, 840 (D. C. Cir. 1961), cert. den., 370 U. S. 925.

The licensing and regulatory powers of the State of South Carolina over the business of S. H. Kress and Company do not convert the operations of that business into state action. In these times, virtually every business is licensed and taxed. The interest of the government in obtaining revenue should not convert a private business into an arm of the state. Nor should its regulations in the exercise of its police power to secure the health and safety of the public. This has been the conclusion of all the courts to consider this question. Thus it was stated in *Watkins v. Oaklawn Jockey Club*, 86 F. Supp. 1006 (W. D. Ark. 1949), aff'd., 183 F. (2d) 440 (8th Cir. 1950):

> ". . . the fact that it operates the track under a license from the State Racing Commission does not make it an administrative agency of the State and does not render its actions in operating the track, and excluding or ejecting persons from the track, state action within the provisions of the Fourteenth Amendment and Section 43 of Title 8, U. S. C. A."

The common law requiring innkeepers to serve the public without discrimination was a law dictated in great part by circumstances. The law as applied to innkeepers was confined to exceptional callings where the needs of the public urgently required that the service be provided. An example of this today is the common carrier. The great multiplicity of restaurants and other public eating places today is a matter of common knowledge. The business of providing

meals to the public is not one which presents an urgent need for service to all. There is no necessity to equate such a business to that of a common carrier. Common carriers today are extensively licensed and regulated. But such licensing and regulation merely add to their duties. They do not change them. On the other hand, licensing and regulation do not convert private carriers into public carriers. *Rutledge Co-op. Ass'n v. Baughman*, 153 Md. 297, 138 Atl. 29 (1927); *Continental Baking Company v. Woodring*, 286 U. S. 352.

Another category of enterprise which is required to serve all without discrimination is the public utility. These businesses depend for their existence on a franchise from the state. It is clear, however, that the licensing and regulation of S. H. Kress and Company by the State of South Carolina is not the equivalent of a franchise. The argument that licensing of a race track amounted to a franchise depriving the track owner of the right to select its patrons was rejected in *Madden v. Queens County Jockey Club*, 296 N. Y. 249, 72 N. E. (2d) 697 (1947). On that point the court said:

> "Plaintiff's argument results from confusion between a 'license' imposed for the purpose of regulation or revenue, and a 'franchise'. A franchise is a special privilege, conferred by the State on an individual, which does not belong to the individual as a matter of common right. . . . It creates a privilege where none existed before, its primary object being to promote the public welfare."

Since the Kress corporation did not derive from the state the right to initiate and conduct their business, it remained a private enterprise, regardless of the fact that it was licensed and taxed. *Woollcott v. Shubert*, 217 N. Y. 212, 111 N. E. 829 (1916); *Collister v. Hayman*, 183 N. Y. 250, 76 N. E. 20 (1905). Even racing, which is so closely licensed and regulated as to be no longer a strictly private busi-

ness, and approaches being a monopoly, is not because of that regulation an arm of the State In spite of these close controls it retains its private character including the right of the proprietor to select his patrons at will. *Greenfeld v. Maryland Jockey Club*, 190 Md. 96, 57 A. (2d) 335 (1948); *Garifine v. Monmouth Park Jockey Club*, 29 N. J. 47, 148 A. (2d) 1 (1959).

The argument that state licensing and inspection of restaurants was most recently considered and rejected by the Fourth Circuit Court in *Williams v. Howard Johnson's Restaurant*, 268 F. (2d) 845 (4th Cir. 1959).

III

Petitioners were not denied the freedom of speech secured to them by the Fourteenth Amendment when they were convicted for trespass for refusing to depart after being directed to leave the lunch room of a Kress' Store where they desired to conduct a demonstration.

The freedom of speech which is secured by the Fourteenth Amendment is the freedom of speech of the First Amendment which is an attribute of "liberty" which the Fourteenth Amendment prohibits states from depriving persons without due process of law. *Gitlow v. New York*, 268 U. S. 652; *Fiske v. Kansas*, 274 U. S. 380. The First Amendment provides:

> "Congress shall make no law . . . abridging the freedom of speech. . . ."

The prohibition of the First Amendment is specific, **no law** shall be made which abridges the freedom of speech. It is laws which attempt to restrict this liberty that are forbidden. There is no law of South Carolina in the present case which even remotely interferes with speech.

The clear and present danger test emerged in rulings on the validity of legislative enactments which seemed to

restrict the freedom of speech. That rule requires that before an utterance prohibited by law can be penalized by the government, it must have occurred in such circumstances or have been of such a nature as to create a clear and present danger that it would bring about substantive evils which the government had the right to prevent and sought to do by the law in question. *Schenck v. United States*, 249 U. S. 47. But even that rule is not without limitation. Mr. Justice Holmes qualified it by saying:

> ". . . The First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language." *Frohwerk v. United States*, 249 U. S. 204.

The trespass statute in the present case has nothing to do with speech, and in no way restricts it. The statute declares certain property rights and that alone. There is no claim by petitioners and no proof of discriminatory application of the statute to them. *Yick Wo v. Hopkins*, 118 U. S. 356.

The constitutional purpose in proscribing legislation against free speech was to leave the arena open for free trade in ideas. It is implicit that such speech will be at the proper place and with the consent of the listener.

The right of freedom of speech is closely bound to the right of freedom of assembly. Of course, a man may speak what he desires in his own home. But in order for there to be any interchange of thoughts in an effort to convince, we must look to the public places. It is in the streets and parks where the freedom of speech reaches its full capabilities. There is the opportunity to find a diversity of opinions and the makings of a discussion of different views. The streets are the natural and the proper places for the dissemination of information and opinion. *Schneider v. State*, 308 U. S.

147; *Hague v. C. I. O.*, 307 U. S. 496; *Thornhill v. Alabama*, 310 U. S. 88. Even where the streets and parks are privately owned, as in company towns, citizens have a right to go there to communicate information, unimpeded by trespass laws. *Marsh v. Alabama*, 326 U. S. 501; *Tucker v. Texas*, 326 U. S. 517. Even speech on the streets and other public places is not without some liability to control. *Saia v. New York*, 334 U. S. 558.

When the place of speaking changes away from public property and the traditional areas of free interchange, the rights of those who would speak are altered. Property rights come into play. On private property the right of freedom of speech must yield to the property right of the landowner to eject trespassers. *Hall v. Commonwealth*, 118 Va. 72, 49 S. E. (2d) 369, (1948), app. dism. 335 U. S. 875, reh. den., 335 U. S. 912. In that case a conviction for trespass under a statute similar to the one here was upheld, where a member of a religious sect insisted on distributing information in the halls of an apartment building after being requested to leave. The court stated that these places could not be regarded the same as public roads. Hallways are not the proper place for public assembly, or for the discussion of public questions. *Watchtower Bible & Tract Society v. Metropolitan Life Insurance Company*, 279 N. Y. 339, 79 N. E. (2d) 433 (1948); *Commonwealth v. Richardson*, 313 Mass. 632, 48 N. E. (2d) 678 (1943).

A public store is not the proper place for discussion either. It is a commercial establishment, devoted to business uses. People do not ordinarily congregate there, nor do they resort to such a place to discuss the great and burning issues of the day.

The petitioners were not exercising any right of freedom of speech toward the proper persons. There is implicit in the idea of speech the idea of communicating informa-

tion. These petitioners were not attempting to publicize any argument they had to make. The purpose of picketing, which this resembles, is to inform members of the public of an existing state of affairs, usually a labor dispute. *Thornhill v. Alabama*, 310 U. S. 88. Here, however, there was no attempt or purpose to convey information to the public, or to seek to enlist public support or public sentiment in their favor. Just the opposite, the petitioners were conducting an argument with S. H. Kress and Company. They had a right to ask Kress' for service in these circumstances. That was the proper expression of their side of the argument. But they had no right to repeat their views over and over after the management had expressed its opinion by denying them service and requesting them to leave. When that exchange was ended, their rights of speech were ended, too. At that point the property rights of the Kress Company became paramount.

On the street, when a listener is accosted, he may choose to stop and talk or he may choose to turn away. When a man is in his home or on his property, however, he has no duty to leave and retreat. Such a person can require the would-be speaker to turn away, and if he does not, prosecute him for trespass. Further, to require the property owner to remain and listen in circumstances such as these, makes him a captive audience, and that deprives him of the same rights the petitioners would seek to assert. *Kovacs v. Cooper*, 336 U. S. 77. As Judge Edgerton stated in *Public Utilities Commission v. Pollack*, 191 F. (2d) 450 (1951), reversed, 343 U. S. 451:

> "One who is subjected to forced listening is not free in the enjoyment of all his faculties."

This case lacks the necessary element of a willing listener, without which there is no such thing as free interchange of ideas.

> "The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners." Mr. Justice Reed in *Kovacs v. Cooper*, 336 U. S. 77.

There is another element in this case deriving from the occupation of seats by the petitioners and their refusal to give them up. The silent and forceful occupation of a private person's store is not speech. Such conduct smacks of coercion. It is a demonstration of force, not of reason. The threat of and use of force is not connected in any way with the idea of persuasion by words, thoughts and logic. To characterize the conduct of petitioners they were saying: "If you are not convinced by our talk, we will convince you by taking possession of your premises and denying you the use of them."

The denial of access to a person's property by strikers who are exercising freedom of speech is not lawful. *Carneige-Illinois Steel Corp. v. United Steelworkers of America*, 353 Pa. 420, 45 A. (2d) 857 (1946); *Truax v. Corrigan*, 257 U. S. 312. The right of free speech must yield in these circumstances to other rights. *N. L. R. B. v. Fansteel Metallurgical Corporation*, 306 U. S. 240, held further the seizure of a portion of an employers plant could not be justified under the N. L. R. A., even though the employer may have been engaged in unfair labor tactics, and the discharge of the employees who seized the buildings was upheld. Likewise, laboring men who seize a possession of a vessel in order to publicize a labor dispute and seek to gain advantageous terms in the bargaining are held to be ordinary trespassers, unprotected by any labor statute. *The Oakmar*, 20 F. Supp. 650 (Md. 1937); *Korthinos v Niarchos*, 175 F. (2d) 730 (4th Cir. 1949), cert, den., 338 U. S. 894. The right to freedom of speech does not carry with it the right to deprive another person of his property.

IV

Convictions for violation of a statute making it an offense to remain on premises after being requested to leave, although the statute did not require the person making the request to leave to establish his authority to issue such request, did not deprive petitioners of freedom of speech.

The statute in this case contained no words which were capable of several meanings, or which could be construed to prohibit legitimate acts. *Winters v. New York*, 333 U. S. 507. Statutes such as the one here under consideration are entirely different from the censorship-type statutes considered in *Smith v. California*, 361 U. S. 147, *Winters v. New York, supra, and Burstyn v. Wilson*, 343 U. S. 495. There was nothing here that could have different meanings to different people, or which would permit the application of an arbitrary standard.

To require a person in possession of land to identify his authority to a trespasser before he could take steps to eject him would make a mockery of the law. Ordinarily the possessor would be unable to prove this authority except by stating it verbally. What landlord carries his deed or lease in his pocket? The public record of deeds and leases is notice to the world of the owners and holders thereof. But many persons are in possession of property under oral leases, or under an implied lease, as tenants at will holding over at the end of the term, or tenants from month to month. What good and what point could be gained by having the person in possession state his claim is unclear. Looking at it from the viewpoint of the petitioners, and others who would trespass, it is clear that they always know about the absence of their own authority. There is no requirement in the law relating to larceny to which this is analogous, that the thief be instructed as to the ownership of what he is about to steal.

The rule of *scienter*, which the petitioners discuss, is wholly a different matter. *Scienter* is a question of the state of mind of the offender. The requirement of *scienter* is the requirement of a type of specific intent. *Scienter* or specific knowledge of the criminality of a specific act is not an essential element of every crime, nor does social justice require that it be included in every offense. For the case of statutory offenses, the intent required by the legislature must be proved in order to convict, but there is no requirement that intent of any kind be prescribed. As was stated in *United States v. Greenbaum*, 138 F. (2d) 437 (3rd Cir. 1943):

> "Whether allegation and proof of *mens rea* is requisite to a conviction of a crime which carries with it a possible sentence to penal servitude depends upon the legislative intent evidenced by the statute which defines and punishes the particular offense. *United States v. Balint*, 258 U. S. 250, 252, 66 L. Ed. 604, 42 S. Ct. 301. The constitutional requirement of due process is not violated merely because *mens rea* is not a required element of a prescribed crime."

Many common law crimes require only such a general criminal intent, for example, battery.

If *scienter* could be read into the requirements of this statute, it would not be the *scienter* urged by petitioners. It would not be necessary to satisfy the *scienter* requirement that the person in possession of property prove his authority to require others to leave. All that could possibly be required would be the conveyance to petitioners and persons like them of notice that someone other than themselves asserted the right of possession to their exclusion. Notice to the petitioners, and the notice required by the statute was ample to give petitioners the knowledge that a superior right to possession was being claimed. At that point, had they needed any further information as to the au-

thority of the person requesting them to leave, they were required to inquire as to his authority, or disobey at their peril. When a person in a position of apparent authority requested them to leave, they had the right to inquire of him as to the nature of his authority. Having failed to do that, we may assume they were satisfied by the appearances.

Assuming further that *scienter* is an element of the offense charged by this trespass statute, it is clear that as to these petitioners the requirement of *scienter* was met. At the outset of the trial, it was agreed that the facts and findings of one case would be the facts and findings of all:

> "Judge Jester: And the facts and findings of one case would be the facts and findings of all as far as the record is concerned?
>
> "Mr. Smith: [Willie T. Smith, one of petitioners' counsel] That is correct." (R. 6.)

The manager of the store in Greenville testified positively that he was the manager and that he requested petitioners to leave. (R. 19.) The only one of the petitioners to testify at the trial knew the person ordering them to leave was the manager as she had spoken to him over the telephone previously (R. 39) and she recognized him at the store at the time of the demonstration. (R. 37, 41.) No matter what interpretation is given the statute in this case, the petitioners have violated its terms and their conviction and punishment thereunder was proper.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

Respectfully submitted,

THOMAS A. WOFFORD,
THEODORE A. SNYDER, JR.,
200 Masonic Temple,
Greenville, South Carolina,
W. H. ARNOLD,
City Attorney,
Lawyers' Building,
Greenville, South Carolina,
H. F. PARTEE,
Assistant City Attorney,
Lawyers' Building,
Greenville, South Carolina,
Attorneys for Respondent.